

Date of Hearing: June 26, 2007

ASSEMBLY COMMITTEE ON JUDICIARY
Dave Jones, Chair
SB 777 (Kuehl) – As Amended: May 10, 2007

SENATE VOTE: 23-13

SUBJECT: DISCRIMINATION: STUDENT CIVIL RIGHTS ACT

KEY ISSUE: SHOULD THE SPECIFIC NON-DISCRIMINATION PROVISIONS OF THE EDUCATION CODE BE CLARIFIED TO ENSURE THAT THEY ARE UNDERSTOOD TO BE CONSISTENT WITH EXISTING COMPREHENSIVE NON-DISCRIMINATION OBLIGATIONS?

SYNOPSIS

This bill would revise the current list of prohibited bases of discrimination enumerated in the Education Code, so that they are consistent with the protected characteristics contained in the definition of hate crimes in the Penal Code. This bill would also define disability, gender, nationality, race or ethnicity, religion, and sexual orientation for this purpose, consistently with their definition in the hate crimes law, and replace uses of the outdated term "handicapped" with the preferred term "disabled" and its variations. Supporters, representing major civil rights groups, education advocates, community organizations and others, contend that standardizing protected characteristics among the anti-discrimination statutes is important in order to rectify deficiencies and resolve confusion with respect to education equity. Opponents however argue, in summary, that the bill "would ban any moral viewpoint contrary to the radical gay agenda and demand that deviant sexual behavior be portrayed as normal."

SUMMARY: Creates consistency in educational policy with respect to non-discrimination on the basis of specified characteristics. Specifically, this bill:

- 1) Revises the current list of prohibited bases of discrimination and the kinds of prohibited instruction, activities, and instructional materials in the Education Code so as to make the types of prohibited discrimination explicitly consistent with the protected characteristics contained in the definition of hate crimes in the Penal Code.
- 2) Defines disability, gender, nationality, race or ethnicity, religion, and sexual orientation for this purpose, consistently with the hate crimes statute.
- 3) Replaces current uses of the term "handicapped" (and variations on that term) in the Education Code with the preferred term "disabled" and its variants.
- 4) Restates the existing obligation regarding non-discrimination in teacher instruction, instructional materials and district-sponsored activities by deleting the prohibition against "reflecting adversely upon" a specified characteristic and replacing it with a more comprehensible standard "promotes a discriminatory bias" based on the specified characteristics.

EXISTING LAW:

- 1) Declares that it is the policy of the state to afford equal rights and opportunities to all persons in public and educational institutions of the state, as well as private schools that receive or benefit from state financial assistance, regardless of their sex, ethnic group identification, race, national origin, religion, or mental or physical disability. (Education Code sections 200, 220, 51004, 66030, 66251, 66270. All further statutory references are to the Education Code unless otherwise noted.)
- 2) Prohibits a person from being subject to discrimination on these specified bases and contains various provisions to implement that policy. (*E.g.*, sections 220, 235, 35316, 35351, 44253.2, 47605.)
- 3) Prohibits a teacher from giving instruction, and a school district from sponsoring any activity, that reflects adversely upon persons because of their race, sex, color, creed, handicap, national origin, or ancestry. (Section 51500.)
- 4) Prohibits the State Board of Education and the governing board of a school district from adopting for use in the public schools any instructional materials that reflect adversely upon persons because of their race, sex, color, creed, handicap, national origin, or ancestry. (Sections 51501, 60044.)
- 5) Defines “hate crime” as a criminal act committed, in whole or in part because of a person’s actual or perceived disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these characteristics. (Penal Code section 422.55.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: In support of the bill the author states:

Harassment based on discrimination is frequent in schools in California. Data from California Healthy Kids Survey (CHKS), the largest study of 7th-12th grade students, shows that each year, 14.3% of all students report harassment because of their race or ethnicity, 9.1% report harassment because of their religion, and 7.5% report harassment because they are gay or lesbian or someone thought they were, and nearly 400,000 students are harassed because of their race.

Discriminatory harassment is a serious problem because it is linked to higher levels of academic, health and safety risk. Students who reported discriminatory harassment were twice as likely to be depressed, were more likely to use and abuse alcohol and other substances, and reported significantly lower grades than students who reported no harassment.

Research has shown that inclusive school policies and curriculum make a difference: when students report that their schools have non-discrimination and anti-harassment policies that include sexual and gender identity, and when they say that they have learned about LGBT (Lesbian, Gay, Bisexual and Transgender) issues at school, they report less harassment and they feel safer.

Consistency in Education Non-Discrimination Policy. Education Code section 200 broadly sets forth the state's policy to afford equal rights and opportunities to all persons in public or private schools and educational institutions of the state regardless of their sex, ethnic group identification, race, national origin, religion, or mental or physical disability. Correspondingly, section 220 contains a blanket prohibition of discrimination which provides that students in all publicly-funded educational institutions are protected from discrimination based on actual or perceived sex, ethnic group identification, race, national origin, religion, color, mental or physical disability or association with a person who has any of these characteristics. These sections also prohibit discrimination based on actual or perceived characteristics contained in the hate crimes statute, section 422.55 of the Penal Code – disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these characteristics.

In addition to these global non-discrimination provisions, other sections of the Education Code likewise prohibit discrimination in specific circumstances of educational institutions, but have not been consistently updated to reflect evolving state equal opportunity policy. For example, some of these code sections fail to include sex or disability. Although those specific directives are subsumed by and subordinate to the general prohibitions, the exclusion of some protected characteristics from the specific sections can create confusion and uncertainty when, as one would expect, members of the education community consult specific provisions of the Education Code to understand their non-discrimination obligations. This bill would provide better guidance by creating consistency among the statutes prohibiting various forms of discrimination by revising the list of prohibited bases of discrimination in Education Code section 200 and 220 (K-12) and sections 66251, 66270 (higher education) so that it corresponds with the list in the hate crimes statute. This bill would also define the protected characteristics consistently with the definitions currently codified in the hate crimes law.

As opponents note, the main effect of this revision is to expressly add “sexual orientation” to the list of protected classes. However, the explicit inclusion of sexual orientation is not truly a substantive change because sections 200 and 220 already cross-reference the list of prohibited characteristics in the hate crimes statute, which includes sexual orientation. In other words, the bill simply adds expressly what is already incorporated by reference. The bill notably does not in any way eliminate or reduce the existing exemption from non-discrimination obligations by religious schools when compliance with the obligation would be inconsistent with the religious tenets of the school. (*See, e.g.,* Op. of Attny Gen. 99-1001 (May 1, 2000).)

Achieving consistency in the anti-discrimination provisions of the Education Code is comparable to other measures that have been signed into law to achieve consistency with regard to discrimination policy in employment and housing. (See, for example, AB 2900 (Laird 2004) which amended 35 specific labor and employment-related nondiscrimination provisions and AB 2800 (Laird 2006), which similarly amended 17 specific housing related nondiscrimination provisions.) In addition, the Legislature has explicitly added sexual orientation to various non-discrimination statutes, including statutes where it was already implied. (AB 1400 (Laird 2005) (Unruh Civil Rights Act), SB 1441 (Kuehl 2006) (discrimination in state-funded programs).)

Replacing references to “handicap” with the term “disability.” Various provisions of the Education Code still use the outmoded terms “handicapped pupils,” “handicapped,” “physically handicapped pupils,” “physically handicapped adults,” “the handicapped,” and “handicapped

persons.” This bill would update these provisions by changing these terms to “pupils with disabilities,” “adults with disabilities,” “pupils with physical disabilities,” “adults with physical disabilities,” and “persons with disabilities.” These changes simply reflect modern person-first usage.

Rectifying Ambiguity In Non-Discrimination Obligation Regarding Instruction And Materials.

Existing law provides that no teacher shall give instruction, no textbook or instructional materials shall be adopted, nor shall a school district sponsor any activity that "reflects adversely upon persons" because of a characteristic listed in Section 220. Although the principle of non-discrimination is well accepted, the phrasing of this obligation has been criticized as unworkably vague and unnecessarily confusing. Indeed, research reveals that no other statutory non-discrimination provision in California law uses this term. This bill therefore replaces the awkward phrase "reflecting adversely upon" with the more comprehensible and straightforward statement that instruction and materials should not "promote a discriminatory bias" because of the protected characteristics. Although not intended to diminish the existing non-discrimination duty, this wording is believed to better capture the goals and principles of the Education Code.

Author's Technical Amendments. The author appropriately proposes to correct drafting errors with the following amendments:

Revise the definition of "disability" in sections 210.1 and 66260.5 so that it references the accepted FEHA definition and is consistent with the Penal Code definition, by adding the phrase "*as defined in Section 12926 of the Government Code.*"

Restore the existing prohibition against age discrimination in sections 260, 66030, 66292, 66292.1, 66292.2, 69535, and occupation in section 60044, and restore the term "ethnic group identification" in, e.g., section 200 and 220, by adding it to the definition of "race or ethnicity" in section 212.1 and 66261.7.

Revise sections 51500, 51501 and 60044 so that they prohibit materials and activities that ~~reflects or promotes~~ **promote** a discriminatory bias ~~against any person~~ because of a characteristic listed in Section 220.

ARGUMENTS IN OPPOSITION: The Traditional Values Coalition writes in opposition to the bill, summarizing its arguments as follows:

Effectively, this bill would ban any moral viewpoint contrary to the radical gay agenda and demand that deviant sexual behavior be portrayed as normal.

This means that all textbooks would have to positively portray the homosexual, bisexual or transgender lifestyles. To positively portray means equal or even portrayal in all occupations, achievements, parenting activities, traditional and non-traditional activities, all roles and in ALL portrayals since the bill would amend Education Code section 60044 to include sexual orientation and gender in the curriculum standards regarding male and female roles.

SB 777 is clear, no teacher instruction, no textbook, no school activity, nor an instructional materials could "reflect" or "promote" a "discriminatory bias against any person..." who is homosexual, bisexual or transgender.

SB 777 cleverly accomplishes two major goals of radical homosexual activists: It gives pro-homosexual teachers free reign to teach whatever they want about the alleged positive aspects of homosexuality – and it silences all opposition to it. Teachers would be free to promote homosexuality but banned from discussing any negative consequences or allowing opposition to these lifestyles for fear of fostering or promoting discrimination.

SB 777 is a dangerous bill for several reasons: 1) It forces all subjects to focus on an aspect of sexual life without proper context; 2) It will indoctrinate young children into an inaccurate perspective on homosexuality during some of the most formative years of their lives; 3) It may allow for the banning of Bibles, Torahs, and other religious texts that speak out against homosexuality; and 4) It discriminates against religious viewpoints, and comprises a direct attack upon religious liberty and tolerance, which are the bedrock of American society.

The Capitol Resource Institute also opposes the bill, stating: "Similar to last session's highly controversial SB 1437, this legislation would ban any textbooks, teaching or activities in schools that "reflect or promote bias" against homosexuals, transgenders, bisexuals, and those with gender (perceived or actual) issues. This legislation would ban private schools from any teaching or activities deemed "adverse" to homosexual or other alternative lifestyles. This means that any teaching promoting traditional families would be discriminatory. Any activities such as having a prom king and queen or gender-specific bathrooms would also be considered discriminatory." CRI goes on to argue, "Also similar to last session's SB 1441, this bill specifically discriminates against religious and moral institutions by preventing any public funds, including Cal Grants, from going to "discriminatory" Christian colleges and universities. Because public funding can find its way into almost any school through disabled student aid, lunch programs and a wide variety of other state programs. SB 777 goes much further than any other past attack on the moral and religious beliefs of Californians. This bill specifically targets people of faith and then discriminates against their sincerely held beliefs by banning their freedoms of speech and association."

Similarly, the California Family Council contends:

SB 777 places the authority of Section 422.55 of the state Penal Code (the definition of hate crimes) into all of California's Education Code. If successful, two dozen sections of the Education Code would be amended to prohibit any instruction, school activities, or instructional materials that may "reflect adversely upon persons because of their disability, gender, nationality, race or ethnicity, religion, and sexual orientation." Based on already established "hate crime" terminology, and building on a subjective interpretation for "adverse reflection upon persons," SB 777 would re-engineer the curricula and culture of publicly funded schools.

Under the guise of "bias-free education," SB 777 would, in truth, silence students and teachers from the free expression of beliefs and opinions that run contrary to total and complete acceptance of all forms of sexual behavior. In fact, this bill threatens an accurate portrayal of history and social science, which would be silenced by the possibility of reflecting adversely on an individual or group.

SB 777 is not bias-free, as its proponents claim. It is intolerant of opposing beliefs and perspectives.

The bill also adds "agnosticism and atheism" to the list of acceptable religions. This new definition includes religious beliefs, observances, and practices. In reality, agnosticism and atheism are patently non-religious belief systems and should not be classified as "religions." The basic premise of both categories actually deny or question the existence of religion and, therefore, any inclusion of these two terms as religion is diametrically opposed to the accuracy of the current and historical definition of religion.

The Campaign for Children and Families states that it opposes SB 777 "because schools should promote academics, not a sexual agenda that shocks and disturbs parents. SB 777 mandates that California school textbooks be altered to positively portray transsexuality, bisexuality and homosexuality to children as young as kindergarten, without parental permission. The bill requires that this sexual agenda be reflected in textbooks, instructional materials, and school-sponsored activities. These mandates would be enforced by the attorneys at the California Department of Education and would harm schools that are dedicated to academic excellence and parental involvement."

"When California public schools are already suffering from low test scores and a high drop out rate in certain populations, it is neither helpful nor appropriate to pass legislation that promotes a divisive sexual agenda on school campuses and among parents in the community. How is a school district to prove that it is not discriminating or reflecting adversely upon homosexuality, bisexuality and transsexuality? Only by positively portraying these lifestyles in textbooks, instructional materials, and school-sponsored activities. Because silence on lesbian, gay, bisexual and transgender (LGBT) issues will not be allowed."

"Even if one supports the LGBT agenda, SB 777 cannot be supported if you believe in academic excellence. Just as a child cannot eat dessert until he's finished his vegetables, no new activity – and certainly not a divisive one as this – should be required of schools before minimum academic standards are achieved. To restore confidence in the education system, we must keep our eye on the ball. SB 777 will cause legal persecution of schools that believe in academic excellence and parental rights. For these reasons, this bill should be opposed."

REGISTERED SUPPORT / OPPOSITION:

Support

AFSCME
AIDS Project Los Angeles
Ally Action
Anti-Defamation League
Asian Americans for Civil Rights
Asian Law Caucus
Bienestar Human Services
California Commission on Status of Women
California National Organization for Women (CA NOW)
California Parent Teacher Association
California Teachers Association

Caruthers High School
Children of Lesbian and Gays Everywhere (COLAGE)
Equality California (sponsor)
Gay and Gender Research
Gay and Lesbian Adolescent Social Services (GLASS)
Gay, Lesbian and Straight Education Network (GLSEN)
GLSEN Orange County
Gay Straight Alliance Network
Hillcrest Youth Center of the San Diego LGBT Community Center
Inland County Stonewall Democrats
Lambda Letters Project
Light House Community Center
Los Angeles Gay and Lesbian Center
Mexican American Legal Defense and Education Fund
National Center for Lesbian Rights (NCLR)
Our Family Coalition
Planned Parenthood
Project 10
Rockway Institute at Alliant International University, Los Angeles
Transgender Law Center
A few individuals

Opposition

California Family Council
California Catholic Conference
Campaign for Children and Families
Capitol Resource Institute
Concerned Women for America
Traditional Values Coalition
Approximately 10 individuals

Analysis Prepared by: Kevin G. Baker / JUD. / (916) 319-2334